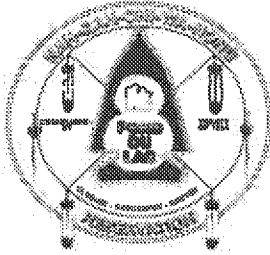


FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA RESERVATION BUSINESS COMMITTEE LEGAL AFFAIRS OFFICE



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By email

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To: Kathlene Butler, Butler.Kathlene@epa.gov, EPA Office of
Inspector General

From: Fond du Lac Band of Lake Superior Chippewa

CC: Jane Nishida, Nishida.Jane@epa.gov, Principal Deputy Assistant
Administrator, Office of International and Tribal Affairs; Felicia
Wright, Wright.Felicia@epa.gov, Acting Director, American
Indian Environmental Office

Re: Possible Waste, Fraud or Abuse in EPA Region V: Suppression of
Comments on the PolyMet NorthMet NPDES/SDS Water Permit
and § 401 Certification; Making Comments Off the Record in a
Manner that Hides Them From the Public; Failing to Uphold its
Obligation to Review the State Permit for Potential Downstream
Water Quality Standards Violations.

Dear Ms. Butler:

The Band has received information from a variety of sources regarding possible waste, fraud or abuse in EPA Region V, specifically regarding the Region's oversight responsibilities under the Clean Water Act ("CWA") and the tribal trust responsibility as they relate to PolyMet Mining Inc.'s proposed NorthMet project ("NorthMet Project" or "Project"), which is a copper-nickel sulfide mine proposed in northeastern Minnesota. We understand that a complaint related to these issues has been submitted by a retired U.S. EPA Regional Counsel, and that his complaint includes detailed information about highly irregular omissions and practices on the part of the Region V Office. The Band has serious concerns about these irregularities and their effect on the recent state permitting decisions that have been made in connection with the NorthMet Project. The Band is also concerned about the effect that these on-going practices will have on PolyMet's application for a Section 404 Permit pending with the U.S. Army Corps because of the EPA's role regarding the state permits upon which the U.S. Army Corps will rely. As such, the Band decided to file its own independent complaint.

The Band has additional information and experience with the Region V Office on the regulatory and consultative framework for the NorthMet Project. The Band has been closely scrutinizing and extensively commenting on ferrous and sulfide mining permit actions and environmental review since 2005. Mining projects like PolyMet's degrade and destroy not only sensitive pristine habitat but the cultural and natural resources that Band members rely upon, and which are protected by the Treaty with the Chippewa, 10 Stat. 1109 (Sept. 30, 1854). Additionally, the Band's Reservation lies directly downstream of the proposed Project and is hydrologically connected via the St. Louis River. The Band has Treatment as a State status for Section 303 of the CWA and the EPA has approved our water quality standards. The Band's concerns for the NorthMet Project and other existing, expanding hard rock mines relate both to the diminishment of our off-Reservation rights, and actual and potential violations of our water quality standards from mine discharges upstream of the Reservation.

We have recently come to understand the extent to which the Region V Office has failed to meet basic oversight duties for a water quality permit issued by the Minnesota Pollution Control Agency ("MPCA") for PolyMet under the State's authorized National Pollutant Discharge Elimination System ("NPDES") program. The NorthMet Project has undergone extensive environmental review and a lengthy permitting process, during which the Region V Office systematically reviewed and provided ongoing written comments regarding the need for the NPDES permit to meet minimum federal requirements and ensure the protection of downstream water quality. Those Region V comments and communications with the MPCA were extensively cited by the Band in our formal comments on the draft NPDES permit, as they clearly identified multiple matters whereby the State's approach to water permitting *still* failed to meet federal requirements, and how those deficiencies should be remedied.

Prior to issuance of the final permit, Region V had, on multiple occasions, advised the State that an adequate "reasonable potential analysis" was needed, and any necessary water quality based effluent limits ("WQBELs") needed to be developed. Technology based effluent limits alone would not be sufficient, because any permit must also include "any more stringent limitation . . . necessary to meet water quality standards." 33 U.S.C. § 1311(b)(1)(C). WQBELs are generally needed when there are planned significant discharges into waters with limited flow, such as those which dominate the landscape of wetlands and headwaters tributaries at the PolyMet mine site and plant site.

After the public comment period ended, the MPCA sent their revised NPDES permit and supporting documentation to Region V on October 25, 2018 for review. Although the final permit did address some of the deficiencies identified by Region V and other commenters, it still did not adequately address several key deficiencies consistently communicated to the State by Region V over the past several years. Yet after years of direct and on the record involvement in the State's permitting process, according to the State's official PolyMet Permitting notice, "the EPA had no comments during the period allotted, and MPCA Commissioner John Linc Stine signed the final permits effective Dec. 20, 2018." At best, this statement is highly misleading.

The Band has learned from various sources that there were written Region V staff comments on the final permit, but they were not submitted for the record – in other words, suppressed – on direction from Regional Administrator Cathy Stepp. Instead, the Band was

informed that in April 2018 critical Region V staff comments were conveyed only verbally to state officials by phone, suggesting some level of cooperation in hiding those concerns from the public and keeping them out of the administrative record. This failure to provide (for the record) such comments appears to violate legal and certainly ethical requirements and, sadly, appears to be part of a larger pattern by Region V to suppress staff comments on other MPCA permitting actions as well. If true, this confirms that EPA is not carrying out its basic responsibilities, including effective oversight of delegated state regulatory actions. The public interest in effective and thorough environmental review is significant and critically important to ensuring the public's confidence that its government agencies act independently, thoroughly, and transparently when reviewing permit applications. The environmental dangers at stake here are serious and the public interest will be injured by the EPA's failure to carry out its responsibilities and oversight of the permitting process.

Under 40 C.F.R. § 123.24(d)(2), EPA must review all state water permits where the discharges "may affect the waters of a State other than the one in which the discharge originates." The Band's status under the CWA and the Reservation's location downstream of the proposed Project clearly meet this statutory threshold. Therefore, Region V was required to review this permit, which implies the submittal of substantive comments. Further, once this permit was reviewed and significant deficiencies with respect to federal water quality permitting requirements were identified, Region V's comments should not have been suppressed. It appears the Regional Administrator violated federal regulations by suppressing agency comments, and the Band's view is that it is highly unethical to suppress the results of a permit review that has revealed serious violations of law. Finally, EPA has oversight responsibilities under the CWA that obligates it to formally object to a deficient state-issued permit, and if necessary, take over the issuance of the permit. This is critical to ensure not only public health and safety, but protection of the Band's downstream water quality.

Regrettably, the Band's concerns regarding Region V's actions – or lack thereof – go well beyond the disturbing aspects of the NPDES permitting for the proposed Project. Given the Band's status as a cooperating agency under the National Environmental Policy Act and its water quality jurisdiction under the CWA, we have actually engaged extensively and affirmatively with Region V in both formal consultation and informal technical staff-level discussions about the Project. We had clear expectations, through verbal commitments by Region V management, that the Region would offer meaningful consultation to the Band during all phases of the permitting process (e.g., water quality, wetlands) because of our *shared recognition of potential impacts to tribal waters*. That critical decision-making time is now upon us, yet the Region has neither initiated consultation with the Band *nor responded* to multiple, specific and detailed written correspondences from the Band's Chairman to the Region V Administrator.

The Band strongly urges the Office of the Inspector General to closely investigate the actions and conduct of the Region V office on permit reviews related to PolyMet's NorthMet Project. The Band would be happy to cooperate with any investigation.

For further information you may contact the Band's legal counsel, Sean Copeland, Tribal Attorney, via email at: SeanCopeland@fdlrez.com, phone: (218) 878-7494; or Seth Bichler, Staff Attorney, via email at: SethBichler@fdlrez.com; phone (218) 878-7393.